Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1663-F

Appeal MA-020055-1

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NATURE OF THE APPEAL:

In this appeal, I issued Interim Order MO-1633-I, on April 11, 2003. I ordered the Waterloo Regional Police Service (the Police) to disclose certain records or portions of records, and upheld the application of exemptions under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) in relation to other records. I also indicated that I was reserving my decision on the application of section 12 to two portions of pages 122 and 123 of the records, pending notification to the Ministry of the Attorney General (the Ministry).

Following Interim Order MO-1633-I, I sent a Supplementary Notice of Inquiry to the Ministry, inviting it to submit representations on the application of section 12 to the information at issue. The Ministry provided me with representations, which were shared with the appellant. The appellant has also provided representations on this issue.

DISCUSSION:

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/SOLICITOR-CLIENT PRIVILEGE

The sole remaining issue in this appeal is the application of section 12 in conjunction with section 38(a) of the *Act*. Under section 38(a), the Police have the discretion to deny an individual access to his or her own personal information in instances where the exemption in section 12 would apply to the disclosure of that information.

Section 12 of the *Act* reads:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 12 contains two branches, a common law solicitor-client privilege and a statutory one. In the discussion below, I will consider both branches together, unless it is necessary to distinguish between the two.

Solicitor-client privilege under section 12 encompasses two types of privilege:

- solicitor-client communication privilege
- litigation privilege

The Police take the position that both types of privilege apply in this appeal. The Ministry agrees with the Police that solicitor-client privilege applies to the severed portions of pages 122 and 123. The appellant asserts that solicitor-client privilege has been waived and further, that any litigation privilege has ended with the completion of litigation. The appellant also claims that criminal activity on the part of the Crown and the police voids solicitor-client privilege.

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The Police assert that in *R. v. Campbell*, [1999] 1 S.C.R. 565, the Supreme Court of Canada ruled that advice given to the police by a Crown prosecutor is protected by privilege, similar to solicitor-client privilege, so that police and prosecutors can confer without fear of any need to disclose their discussions.

The Police submit that although police are not clients of the prosecutor, the Supreme Court has recognized the need for a privilege similar to solicitor-client privilege in order to avoid the chilling effect that the risk of such disclosure could have on the candour and content of such advice.

On this basis, the Police assert that pages 122 and 123 are privileged communications between the Crown attorney and the Police.

The Ministry supports the position of the Police on this issue, stating that the severed portions of these pages constitute privileged communications between the Police and the Crown attorney.

The appellant disputes any of the allegations that have been made against him, providing background and information in support of his position. With respect to the application of solicitor-client privilege, the appellant refers to a note on page 122, approving of disclosure to the appellant's counsel. The appellant states that this demonstrates waiver of the privilege.

The appellant also refers to criminal activity on the part of the Crown and the Police which, he asserts, voids the application of solicitor-client privilege.

Analysis

In *R. v. Campbell*, the Supreme Court of Canada adopted what it described as the "functional" definition of solicitor-client privilege set out in *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 at p. 872:

> Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.

The Court found that the consultation by an officer of the Royal Canadian Mounted Police (the RCMP) with a Department of Justice lawyer over the legality of a proposed "reverse sting" operation by the RCMP fell squarely within the functional definition. The Court emphasized that it is not everything done by a government (or other) lawyer that attracts solicitor-client

privilege, providing some examples of different responsibilities that may be undertaken by government lawyers in the course of their work. The Court stated that

> [w]hether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.

R. v. Campbell has been applied in orders of this office, such as in PO-1779, PO-1931 and MO-1241. In each of these orders, a solicitor-client privilege was found on the basis that the police (a municipal police service or the Ontario Provincial Police) sought legal advice from Crown counsel. All communications within the framework of this relationship were found to qualify for solicitor-client privilege under either section 12 of the *Act*, or section 19 of the provincial *Act*. In addition, in Order PO-1779, in relation to the OPP, Assistant Commissioner Tom Mitchinson analysed the relationship between the OPP and the Crown as follows:

> However, there is one further aspect to consider before concluding that solicitor-client communications privilege is established. In Order P-613, section 19 was not applied on the basis that there is no solicitor-client relationship between Crown counsel and the OPP. However, in my view, this interpretation is no longer supportable as a result of the recent Supreme Court of Canada decision in *R. v. Campbell*, [1999] 1 S.C.R. 565. In that case, the Court concluded that a solicitor-client relationship did exist between counsel with the federal Department of Justice and the R.C.M.P. The decision sees the R.C.M.P. as a "client department" of the Department of Justice and, therefore, it is difficult to see how the same conclusion could not apply vis à vis the Ministry of the Attorney General and the OPP. In my view, a solicitor-client relationship exists between the OPP and Crown counsel.

This analysis has been followed in subsequent orders applying the solicitor client privilege under the provincial *Act* to communications between the OPP and Crown counsel.

The circumstances described in Order PO-1779 do not apply to the relationship between a municipal police force and Crown counsel. Even the Police in this case do not assert that they can be viewed as a "client department" of Crown counsel. Therefore, whether a solicitor-client relationship can be established in a particular instance depends on the application of the functional definition set out in *Descôteaux v. Mierzwinski* and approved in *R. v. Campbell*, above. In MO-1241, former Adjudicator Holly Big Canoe specifically found that the Police sought legal advice from the assistant crown attorney. Other than MO-1241, I am not aware of any orders of this office which have applied *R. v. Campbell* to communications between a municipal police force and Crown counsel.

In the appeal before me, I find there is an insufficient basis to conclude that the communications on pages 122 and 123 were in relation to the seeking or giving of legal advice. It would not be surprising for the Police and the Crown to be in communication during any given prosecution, as they were here. However, there is nothing in the specific communications at issue, in the surrounding circumstances, or in the submissions before me, to establish that these

communications occurred as part of the seeking of legal advice by the Police from the Crown. I find, accordingly, that the Police have not established that these communications occurred within the framework of a solicitor-client relationship.

Although, in view of this finding, it is not necessary to consider the appellant's claim of waiver, I will observe that the evidence in support of waiver is not convincing. There is evidence that some measure of disclosure was made to the appellant's counsel during the course of the criminal prosecution against the appellant. This is, of course, consistent with the obligations of the Crown during such a prosecution. It has not been established, however, that the specific portion of pages 122 and 123 at issue in this appeal have ever been revealed.

With respect to the appellant's assertions of criminal activity on the part of the Crown and the Police, I have not given any weight to the unproven assertions of the appellant in this regard.

Litigation privilege

Sopinka, Lederman and Bryant, in *The Law of Evidence in Canada* (Toronto: Butterworths, 1992), describe the origins of the litigation privilege, at p. 653:

> As the principle of solicitor-client privilege developed, the breadth of protection took on different dimensions. It expanded beyond communications passing between the client and solicitor and their respective agents, to encompass communications between the client or his solicitor and third parties if made for the solicitor's information for the purpose of pending or contemplated litigation. Although this extension was spawned out of the traditional solicitor-client privilege, the policy justification for it differed markedly from its progenitor. It had nothing to do with clients' freedom to consult privately and openly with their solicitors; rather, it was founded upon our adversary system of litigation by which counsel control fact-presentation before the Court and decide for themselves which evidence and by what manner of proof they will adduce facts to establish their claim or defence, without any obligation to make prior disclosure of the material acquired in preparation of the case.

As to the breadth of this privilege, the Court of Appeal in Ontario has described it as protecting records created for the "dominant purpose" of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

In Manes and Silver, *Solicitor-Client Privilege in Canadian Law* (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
>
> > A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it

> was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.
>
> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.
>
> . . . . .
>
> [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

In *General Accident v. Chrusz*, above, the Ontario Court of Appeal approved of the "dominant purpose" test from *Waugh* v. *British Railways Board*.

The Police submit that the records at issue were created for the dominant purpose of litigation. The appellant was charged with a criminal offence and the offence was litigated. Privilege is maintained post-litigation. Further, they state that the Police are the client, and they have not waived their privilege.

The Ministry submits that the records came into existence as a result of litigation, i.e., the prosecution of a criminal matter. The records pertain to confidential communications between the Police and the Crown in respect of litigation conducted by Crown counsel.

The Ministry also submits that whether or not the Police may be considered as a "client" of the Crown is not determinative of whether litigation privilege applies. It submits that the Police have a "common interest" with the Crown in respect of the litigation, in that there was an actual contemplation of litigation shared by the Police and the Crown against the accused in this case. The Ministry relies on the discussion of "common interest" in *General Accident v. Chrusz*.

The appellant's submissions on the application of the litigation privilege overlap with those in relation to the solicitor-client communication privilege. To the extent that I have discussed some of those earlier, it is unnecessary to consider them here. Further, the appellant asserts that the litigation privilege has ended with the completion of the litigation against him. He relies on Order P-1551, in which former Inquiry Officer Holly Big Canoe considered whether Crown counsel litigation privilege ends with the termination of litigation.

Analysis

I am satisfied that the severed portions of pages 122 and 123 were created for the dominant purpose of litigation, namely the prosecution of the appellant. They contain notes created by a police officer and directed to the Crown Attorney, intended to be used in the prosecution of the appellant. Applying the test enunciated in *Waugh v. British Railways Board*, they are documents "produced or brought into existence either with the dominant purpose of its author, or of the

person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to … to aid in the conduct of litigation".

It is unnecessary to consider whether the Police share a "common interest" with the Crown in the prosecution of the accused. My finding that the litigation privilege applies is based on the conduct of litigation by the Crown, and communications with the Police in the context of that litigation. The privilege at issue is that of the Crown, and not of the Police.

In arriving at my conclusions, it is instructive to consider what might have been the result if the Police had invoked the "transfer" provisions of the *Act*, transferring part of the request relating to these specific pages of the records to the Ministry on the basis of the Ministry's "greater interest". Alternatively, it is instructive to consider what might have been the result if a request had been made for the same records in the possession of the Ministry. In my view, the assessment of the case would have been based on a relatively straightforward application of the principles in *General Accident v. Chrusz* and *Waugh v. British Railways Board*. Once the "dominant purpose" test was met, the records would have been found exempt. I am satisfied that this supports the application of section 12 to exempt copies of the same records, in the possession of the Police.

It remains to consider the effect of the termination of the prosecution on the claim of solicitor-client privilege. The appellant asserts that the charge was eventually withdrawn. The litigation thus is at an end. The decision of the Ontario Court of Appeal in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.) supports the continued application of the litigation privilege in this case, notwithstanding the termination of the litigation. Order P-1551, on which the appellant relies, must be read in light of the findings of the Court of Appeal on this issue. Having regard to those findings, I find that the litigation privilege asserted by the Ministry continues to apply.

In conclusion, I find the information severed from pages 122 and 123 exempt under the solicitor-client privilege in section 12 of the *Act*. I am further satisfied that the Police have exercised their discretion under section 38(a) appropriately in denying access to the information at issue in these pages.

ORDER:

I uphold the decision of the Police to exempt portions of pages 122 and 123 from disclosure.

Original signed by: June 30, 2003
Sherry Liang
Adjudicator